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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL TRAVIS MCINERNEY, Defendant and Appellant.	A127650 (Sonoma County Super. Ct. No. CR914645)

Appellant Michael Travis McInerney appeals from the final judgment following his guilty plea. Appellant asks this court for an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441-442, to determine whether it contains any arguable issues. Our independent review reveals no arguable issues and we affirm the judgment.

BACKGROUND

The information filed in Sonoma County charged appellant in count one with auto theft (Veh. Code, § 10851, subd. (a)), in count two with causing injury while driving under the influence (Veh. Code, § 23153, subd. (a)) with a multiple victim enhancement (Veh. Code, § 23558), and in count three with driving without a license (Veh. Code, § 12500, subd. (b)).

The only prosecution witness at the preliminary hearing was California Highway Patrol Officer Mark Thomas, who responded to a call regarding a traffic accident north of Canyon Drive on March 17, 2007. Thomas testified that he spoke about the incident with witnesses, the defendant, and Officer Kilgore, a second officer involved in this case, all

of whom were already at the scene. Thomas learned appellant's reckless driving had caused an accident involving an allegedly stolen vehicle, and two individuals were badly injured.

Thomas's testimony revealed the following: Two witnesses identified appellant as the person driving the sedan, both by a physical description and because they heard him say, "oh no, I crashed my girlfriend's father's car again and he's going to kill me this time."

One witness described the collision to Thomas as follows: A pickup truck was driving approximately 65 miles per hour when appellant approached from behind traveling at high speed. Appellant attempted to pass the truck by recklessly speeding into the next lane. He struck the back right corner of the truck and caused his car to overturn. The driver of the truck and his front passenger sustained serious injuries and were transported to a hospital.

Kilgore, who arrived at the scene first, told Thomas that appellant was slurring his speech and was hard to understand. Kilgore also noticed that appellant's pupils were locked in place and dilated, and did not change in relation to changes in light. Appellant admitted that he had taken drugs, including a line of cocaine, but kept changing his story about which drugs, how much he had taken, and what day he had taken them. His blood test was sent to the Department of Justice lab and revealed traces of benzodiazepine, cocaine, marijuana, and opiates. These facts, coupled with the circumstances surrounding the collision, led Kilgore and Thomas to believe that appellant was under the influence of a controlled substance at the time of the collision.

Thomas also testified that the sedan he was driving did not belong to appellant, but rather to Allison Reid, appellant's live-in girlfriend, who reported the car stolen. On the evening prior to the incident, Reid was upset and decided to take one-half of a prescribed sleeping pill to help her sleep. Normally, an entire pill is "too strong" for Reid, but appellant "coerced" her to take more than one sleeping pill "to help calm her down." She followed his advice, but had trouble waking up the next morning. While she was still asleep and without her permission, appellant took her car. Appellant did not have

identification on him at the time of the incident, nor had he ever been issued a driver's license.

Appellant pled no contest to all three charges after being advised of his constitutional rights. The prosecution recommended probation as a part of the plea agreement, but the judge stated that he would not promise probation.

Before sentencing, appellant was convicted of unlawful intercourse (Pen. Code, § 261.5 subd. (d)) in an unrelated case in Lake County. Appellant was taken into custody by the Lake County Sheriff's Department in Lakeport, California, causing his failure to appear for the sentencing hearing in this case. The Lake County court sentenced him to three years in prison.

The trial court suspended these criminal proceedings pursuant to Penal Code section 1368 because the judge wanted to inquire into appellant's mental competency. Pursuant to California Rules of Court, rule 4.130, if a judge initiates mental competency proceedings prior to the preliminary examination, counsel for appellant may request a preliminary examination. If such mental competency proceedings are initiated, criminal proceedings are suspended and are not reinstated until appellant is found mentally competent or has his competency restored. The court found appellant to be mentally incompetent to stand trial and committed him to Atascadero State Hospital for treatment. A few months later, appellant was found competent and criminal proceedings were reinstated.

Appellant was sentenced to an aggregate sentence of two years and four months in prison. This sentence was comprised of a 16-month term for causing injury while intoxicated, a concurrent 16-month term for automobile theft, and a consecutive one-year term for the multiple victim enhancement, with 255 days of presentence credits. The sentence included a $600 restitution fine. Appellant also agreed to pay the victims a total of $10,206.67 in restitution.

Appellant filed a timely notice of appeal, along with an application for certificate of probable cause, which was not granted.

On June 22, 2010, counsel for appellant filed a *Wende* brief, raising no arguable issues. Appellant was apprised of his right to file a supplemental brief but has not filed one.

DISCUSSION

In his application for a certificate of probable cause, appellant disputed his sentence and sought to challenge the validity of his plea. In his notice of appeal, appellant marked the box indicating his appeal was based on the sentence; but he also completed the request for a certificate of probable cause, which only challenges the validity of the plea. Marking this box was not a sufficient substitute for the required formal request for a certificate of probable cause, and his request was not granted. Accordingly, he may not obtain review of the validity of his plea here (*People v. Mendez* (1999) 19 Cal.4th 1084, 1088), and appellant may obtain review only on the issue of sentencing. (*Id.* at p. 1088.)

No Contest Plea To The Auto Theft Charge Is Not Appealable

The first issue we review is the plea itself. Prior to appellant's entry of a no contest plea, the trial judge reviewed the waiver of rights form with him to make sure appellant understood his legal rights. Appellant confirmed that he did, and pled no contest to all three counts. The court accepted his plea as being freely and voluntarily made and found a factual basis for the pleas based on the court's review of the file.

An appellant who has pleaded no contest to a charge in the superior court, and wants to appeal the conviction entered thereon, may not obtain review of issues on the legality of the proceedings, including the validity of his plea, unless he has complied with section 1237.5 of the Penal Code and rule 8.304(b) of the California Rules of Court. These provisions require appellant to obtain a certificate of probable cause for the appeal. (Cal. Rules of Court, rule 8.304(b).) Appellant filled out the request for a certificate of probable cause, claiming he did not commit automobile theft, but his notice of appeal only addressed his sentence. He has not obtained a certificate of probable cause. Because appellant did not comply with Penal Code section 1237.5 and California Rules

of Court, rule 8.304(b), he cannot challenge the validity of his plea. (*Mendez, supra*, 19 Cal.4th at p. 1089.)

The Prison Term Decided By The Trial Court

Appellant may obtain appellate review of noncertificate or postplea issues without obtaining a certificate. (*Mendez, supra*, 19 Cal.4th at p. 1088.) In appellant's application for certificate of probable cause, he claims the prison sentence is inappropriate for the crime of automobile theft and that he deserves probation. He states in his application that "the unlawful use of a vehicle is not worth prison time." He claims that because he was given no immediate state prison for auto theft during the change of plea proceeding, and because he has already served prison time for his Lake County conviction, it would be improper and ineffectual to sentence him to more prison time. He also asks for additional presentence credit.

The trial court's decision to sentence appellant to two years and four months in prison lies within its broad discretion and will not be disturbed on appeal absent an abuse of discretion. Discretion is abused when the decision is arbitrary, capricious, or unsupported by the facts before the court. (*People v. Stuart*, (2007) 156 Cal.App.4th 165, 179.) At the time appellant changed his plea, the judge stated that he regarded appellant's crimes to be serious, and that although he would consider probation, it was not guaranteed. At the sentencing hearing, the judge stated that probation was not justified considering appellant violated a *Cruz* waiver by missing his sentencing hearing, severely injured those involved in the crash he caused while he was abusing drugs, and committed a sexual assault while out on bail, leading to another criminal conviction. The judge believed that appellant was entitled to a mitigated term, and sentenced him to the low term of 16 months for his automobile theft conviction, pursuant to Vehicle Code section 23558. He also gave him 255 days of credit. We do not see an abuse of discretion, or any error in appellant's prison sentence.

DISPOSITION

Our independent review of the record reveals no arguable issue that requires further briefing. Accordingly, the judgment is affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Richman, J.